U.S. Department of Justice

United States Attorney
Southern District of New York

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February 6, 2015

By ECF

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *Corporación Mexicana de Mantenimiento Intergral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, Docket No. 13-4022

Dear Ms. Wolfe:

By invitation of the Court and pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a), the United States respectfully submits this brief as *amicus curiae*.

Interest of the United States

Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. ("COMMISA"), a Mexican subsidiary of a Texas-based corporation, brought this action in the United States District Court for the Southern District of New York to enforce an international arbitral award against Pemex-Exploración y Producción ("PEP"), a subsidiary of the Mexican state-owned oil company. Notwithstanding that a Mexican court nullified the arbitral award before the district court issued the ruling now on appeal, the district court both confirmed and augmented the award, relying on what it determined to be a public policy exception that allows confirmation of a nullified award where "the judgment of nullification is repugnant to fundamental notions of what is decent and just." SPA 62 (internal quotation marks omitted).

The United States has several interests in the issues raised by this appeal. First, the United States has an interest in ensuring the correct interpretation and

application of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391, 1602–11 ("FSIA"), and, consistent with established case law, in discouraging over-reliance on participation by foreign entities in New York financial markets as a basis for establishing jurisdiction and/or venue. The United States also has an interest in encouraging the reliable and efficient enforcement of international arbitral awards in aid of international commerce, while giving proper consideration to the judicial proceedings and judgments of other nations. Finally, the United States has a strong interest in the correct interpretation of the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), as well as the similar Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Because the United States is a party to those Conventions and participated in their negotiation, the Executive Branch's views concerning those conventions' interpretation are entitled to "great weight." *Abbott v. Abbott*, 560 U.S. 1, 15 (2010); *see also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

Statement of the Case

A. Arbitration in Mexico

COMMISA and PEP contracted for COMMISA to build and install natural gas platforms in the Gulf of Mexico. Their contracts provided for the application of Mexican law, and for any disputes to be settled through arbitration in Mexico. A 93, 96, 129, 131. PEP was also permitted to "administratively" rescind the contracts in whole or in part. A 74–76.

In March 2004, PEP notified COMMISA that it was administratively rescinding the contracts. A 149, 445. COMMISA initiated arbitration against PEP in Mexico. A 150. In December 2009, a divided arbitral panel issued a $286 million award in COMMISA's favor. SPA 46–47, A 866–68.

B. Initial Proceedings in New York in District Court and on Appeal

COMMISA petitioned to confirm the arbitral award in district court (Hellerstein, *J.*). On August 25, 2010, the district court held that it had personal jurisdiction over PEP and that venue was proper, and it confirmed the arbitral award. PEP appealed.

In the meantime, PEP filed suit in Mexico to nullify the arbitral award and, on August 25, 2011, a Mexican appellate court granted nullification. SPA 48–50. The Mexican court held that administrative rescission of PEP's public works contracts involved the exercise of public authority, and that PEP could not waive its right to exercise that public authority by permitting a private arbitral panel to effectively repeal rescission. A 3745–50. The court opined that its conclusion was "strengthened" by a 2009 legislative amendment, which provided that a challenge to an administrative rescission occurring after May 28, 2009, could not be the subject of arbitration. A 3758. This Court then vacated the district court's judgment and remanded to the district court to consider "whether enforcement of the award should be denied because it 'has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.'" A 2104 (quoting New York Convention, art. V(1)(e), and citing, *inter alia,* the Panama Convention).

C. District Court Proceedings on Remand

After further briefing and a three-day hearing with testimony from experts on Mexican law, the district court again confirmed the arbitral award. SPA 38–69. The district court noted that, under Article 5(1)(e) of the Panama Convention, a court "may" refuse to recognize and enforce an arbitral award that "has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made." SPA 56–57.[1] The district court reasoned that, although courts should not as a general matter confirm a nullified award, there is a narrow public policy exception where the foreign nullification judgment "is repugnant to fundamental notions of what is decent and just." SPA 62 (internal quotation marks omitted).

The district court held that that exception applies here. The court reasoned that, at the time COMMISA initiated arbitration with PEP, it reasonably believed that the parties' dispute could be arbitrated. SPA 63. The court noted that PEP did

[1] The Panama Convention is a multilateral treaty governing the recognition and enforcement of foreign arbitral awards, which entered into force on June 16, 1976. The Panama Convention contains a number of provisions that are similar to provisions in the earlier New York Convention, including Article 5(1)(e). Courts routinely rely on decisions interpreting and applying one Convention in actions brought pursuant to the other. *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994).

not contest the issue of arbitrability until nearly three years later, and opined that it was not until May 2009, when the statute barring arbitration of administrative rescission of public works contracts was enacted, "that there was a source of law that supported the argument that the parties' dispute was not arbitrable." SPA 63–64. The district court recognized that the Mexican court had stated that it was not applying the 2009 law retroactively, and also had cited a 1994 Mexican Supreme Court decision as additional support for its conclusion; but the court opined that the 1994 decision was of only "marginal" relevance, and it concluded that it was the 2009 law, not the 1994 Mexican Supreme Court ruling, that was critical to the Mexican court's decision. SPA 64–65. The district court further stated that what it concluded was Mexico's retroactive statutory application unfairly favored "a state enterprise over a private party," violating what the court characterized as "a basic principle of justice" that when a state waives its sovereign immunity and contracts with a private party, "a court hearing a dispute regarding that contract should treat the private party and the sovereign as equals." SPA 65–66 (citing, *e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996)). The unfairness it perceived was "exacerbated," the district court reasoned, by the fact that a subsequent change in Mexican law had, in the district court's view, left COMMISA "without a remedy to litigate the merits of the dispute." SPA 65–67. Specifically, the district court noted that Mexican law now requires disputes over public works contracts to be adjudicated in the Federal Tax and Administrative Justice Court, which applies a 45-day limitations period rather than the 10-year limitations period that had previously applied to challenges to administrative rescissions brought in the District Court for Administrative Matters.

The district court entered judgment for $465,060,206.42, approximately $106 million more than the original arbitral award, SPA 94, to compensate COMMISA for the amount PEP had collected on COMMISA's performance bond following the Mexican court's nullification of the award, SPA 82–83. The district court reasoned that failing to augment COMMISA's arbitral award by this amount would "undermine the award" that it was enforcing. SPA 83.

ARGUMENT

POINT I

The District Court's Analysis of Personal Jurisdiction Was Flawed: The FSIA Incorporates Requirements That Meet Constitutional Standards, If Applicable

The district court held that it had personal jurisdiction over PEP on the theory that a foreign state instrumentality has no due process rights, and that PEP's actions in connection with issuing debt instruments in the New York financial markets were sufficient to satisfy any applicable fairness or comity requirements. In the view of the United States, the district court's analysis reflects a misunderstanding of the FSIA and erroneously relies on PEP's connection to New York's financial markets.

In holding that PEP lacks due process rights, the district court relied on *Frontera Res. Azerbaijan Corp. v. State Oil Company of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009), where this Court held that, because the jurisdictional requirements of the FSIA were met in an action against a foreign state and its state-owned corporation, the court did not need to engage in a separate due process inquiry. The Court reasoned that a foreign state is not a "person" within the meaning of the Due Process Clause, and that the same is true for a state-owned corporation so controlled by the state as to be its "agent" or "alter ego" under *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 626–27 (1983). *Frontera*, 582 F.3d at 399–400. However, this Court explicitly declined to decide whether a state instrumentality that is juridically separate from the foreign state is entitled to due process protections, or what such protections would consist of in a case brought under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6). *Id.* at 401. *Compare GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012) (holding that separate agencies and instrumentalities of a foreign state are entitled to due process protections, including a requirement of minimum contacts for personal jurisdiction); *First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748–52 (5th Cir. 2012) (same).

This Court need not and should not reach the constitutional question whether a foreign state corporation has any due process rights, because exercising jurisdiction over PEP is consistent with due process. The FSIA's jurisdictional

provisions themselves incorporate a nexus requirement that should be sufficient to satisfy any constitutional standard that might apply. Moreover, even if a separate analysis were required, as discussed further below, it appears that the exercise of jurisdiction in this case would satisfy constitutional standards.

The FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). Section 1330(b) provides that personal jurisdiction "shall exist" over a foreign state or its agency or instrumentality if an exception to immunity in Section 1605 applies and service has been made under Section 1608. 28 U.S.C. § 1330(b). As the legislative history elaborates, "[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied" in the FSIA. H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612. Each of Section 1605's exceptions to immunity "require[s] some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction," thereby "prescrib[ing] the necessary contacts which must exist before our courts can exercise personal jurisdiction." *Id.*

Although the original version of the FSIA did not include Section 1605(a)(6)'s explicit exception to immunity for actions to confirm or enforce certain arbitral awards, which was added in 1988, there is no indication that Congress believed that such an exception would fail to satisfy minimum contacts requirements. The legislative history to the original FSIA suggests that an agreement "to arbitration in another country" could come within Section 1605(a)(1)'s exception to immunity for express or implied waivers of immunity. H.R. Rep. No. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. Prior to the addition of 1605(a)(6), actions to enforce foreign arbitral awards against foreign states were sometimes brought under 1605(a)(1) under an implied waiver theory. *See, e.g., Birch Shipping Corp. v. Embassy of United Republic of Tanzania,* 507 F. Supp. 311, 312 (D.D.C. 1980); *Ipitrade Int'l, S.A. v. Fed. Republic of Nigeria,* 465 F. Supp. 824, 826 (D.D.C. 1978).

This Court should follow the lead of other courts of appeals in holding that it is unnecessary to decide whether a foreign state agency or instrumentality enjoys due process protections, because the nexus required under the FSIA for the exercise of jurisdiction satisfies the constitutional "minimum contacts" test. *See, e.g., Sachs v. Republic of Austria,* 737 F.3d 584, 598–99 (9th Cir. 2013) (en banc) (holding that FSIA exception to immunity for commercial activity carried out in the United States by the foreign state, which requires "substantial contact" with the

United States, "sets a higher standard . . . than the minimum contacts standard for due process"); *see also Hanil Bank v. PT. Bank Negara Indonesia, (Persero),* 148 F.3d 127, 134 (2d Cir. 1998) (holding that it was unnecessary to decide whether foreign state has due process rights because defendant's conduct that satisfied commercial activity exception to immunity was also sufficient to satisfy due process requirements). The approach the United States advocates is also consistent with *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), where the Supreme Court declined to decide whether Argentina was entitled to due process protections, instead reasoning that Argentina possessed sufficient "minimum contacts" with the United States to satisfy any applicable constitutional standards. *Id.* at 619.

The assertion of personal jurisdiction over PEP in this enforcement proceeding comports with any applicable constitutional requirements. Section 1605(a)(6) permits a court to exercise jurisdiction over an action "to confirm an award made pursuant to such an agreement to arbitrate," if the "award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." PEP entered into contracts with COMMISA (a subsidiary of a U.S. corporation), which provided for arbitration of any dispute. PEP, an instrumentality of Mexico, knew or should have known when it entered into the contracts that both Mexico and the United States are parties to the Panama Convention and that, as a result, any Mexican arbitral award could be enforced in U.S. courts. *Cf. Seetransport Wiking Trader Schiffarhtsgesellschaft MbH & Co. v. Navimpex Centrala Navala,* 989 F.2d 572, 578 (2d Cir. 1993) ("[W]hen a country becomes a signatory to the [New York] Convention, . . . the signatory State must have contemplated enforcement actions in other signatory States.") Furthermore, PEP was aware that COMMISA was a subsidiary of a U.S. corporation, and that it was foreseeable that performance of the contract might take place in part in the United States, which it then did. SPA 23. In these circumstances, PEP should reasonably have anticipated being haled into court in the United States in an action to enforce an arbitral award. *See, e.g., S & Davis Int'l, Inc. v. Republic of Yemen,* 218 F.3d 1292, 1304–05 (11th Cir. 2000) (holding that foreign state ministry that entered into contract with U.S. corporation, requiring foreign state to open a letter of credit in the United States and providing for arbitration of any dispute, could reasonably anticipate that the U.S. corporation would sue in U.S. court to enforce any resulting arbitral award).

Although it is unnecessary for the Court to reach this question, the nature of a proceeding to confirm and enforce a foreign arbitral award would also typically

support the conclusion that the exercise of jurisdiction is constitutional—putting to the side the question whether this same conclusion would apply if the underlying award has been nullified. A confirmation proceeding under the Panama or New York Conventions is typically "summary," with the district court doing "little more than giv[ing] the award the force of a court order." *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007). In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Supreme Court reasoned that, once a court with jurisdiction over a defendant has ruled "that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of a debt as an original matter." *Id.* at 210 n.36. It seems appropriate to apply a similar rule in a confirmation proceeding[2]—and the United States also agrees that a court can properly exercise quasi in rem jurisdiction in this context if the defendant has assets in the forum. *See, e.g.*, *Frontera*, 582 F.3d at 398; *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123–26 (9th Cir. 2002). We note, however, that this case law is dependent on the context in which it arose—namely, proceedings to enforce arbitral awards—and that a foreign defendant should not be subject to general jurisdiction simply because the defendant owns property in the United States.

Finally, the United States urges this Court to make clear that a foreign entity's involvement in U.S. financial markets is not itself a sufficient basis for a U.S. court to exercise personal jurisdiction over a dispute that is unrelated to such financing activities. "[T]he prevailing caselaw accords foreign corporations substantial latitude to list their securities on New York-based stock exchanges and to take the steps necessary to facilitate those listings (such as making SEC filings and designating a depository for their shares) without thereby subjecting themselves to New York jurisdiction for unrelated occurrences." *Wiwa v. Royal*

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[2] Although several circuits have rejected arguments that "reduced jurisdictional requirements" apply to the enforcement of arbitral awards, *see* PEP Reply Br. at 8 (citing cases), in the view of the United States, those decisions fail to give effect to the Supreme Court's recognition in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), that there is no rigid formula for delineating the requisite nexus for exercising jurisdiction consonant with due process. *Id.* at 316. The fact that a proceeding is brought to enforce an arbitral award under the New York Convention "rightly colors" the due process analysis, and "the desire to have portability of arbitral awards prevalent in the Convention influences the answer as to whether [the defendant] 'reasonably anticipate[d] being haled into'" a U.S. court. *Telcordia Tech. Inc. v. Telkon SA Ltd.,* 458 F.3d 172, 178 (3d Cir. 2006).

Dutch Petroleum Co., 226 F.3d 88, 97 (2d Cir. 2000) (citations omitted). This established principle is vital to the proper functioning of the U.S. financial markets. The district court's reasoning that PEP's guarantee of bonds issued in New York justified the court's exercise of jurisdiction in this unrelated enforcement proceeding could have a harmful effect on foreign entities' willingness to issue financing in the U.S. markets for fear of broadly subjecting themselves to jurisdiction here. The bond-issuing and guaranteeing activities that the district court emphasized, SPA 26–27, would, standing alone, be insufficient to satisfy the due process requirements for general personal jurisdiction, or the nexus requirements incorporated into the FSIA. As noted, the record refers to other contacts between PEP and the United States that more directly relate to the parties' dealings, which illustrate that the exercise of personal jurisdiction under the FSIA should satisfy constitutional standards.

POINT II

The Southern District of New York Was a Permissible Venue Under 28 U.S.C. § 1391(b)(3)

The district court held that venue was proper in the Southern District of New York, suggesting that PEP's guarantee of debt instruments issued by its parent company in the New York financial markets constituted "doing business" within the meaning of 28 U.S.C. § 1391(f)(3). In the view of the United States, that conclusion was erroneous, but venue was proper in the district court under a distinct statutory provision, 28 U.S.C. § 1391(b)(3).

When the FSIA was originally enacted in 1976, it contained the provision now codified at 28 U.S.C. § 1391(f), which provides in relevant part for venue:

> (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;
>
> . . .
>
> (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

> (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Congress amended the FSIA in 1988 to add an additional exception to immunity for enforcement of foreign arbitral awards, but did not enact any corresponding amendment to the venue provision.[3]

The district court's suggestion that venue was proper under section 1391(f)(3) could subject foreign state agencies and instrumentalities to venue in any forum in which they had minor, unrelated commercial dealings. Foreign state agencies might reasonably object to being haled into a U.S. court in any type of lawsuit based on such dealings when another venue was more appropriate under 1391(f). Such an approach is also inconsistent with well-established case law holding that an entity is not "doing business" in New York for purposes of the venue statutes based solely on financing activities that are unrelated to the subject matter of the litigation. *See* PEP Br. at 28–29 (citing cases); *Wiwa*, 226 F.3d at 97. This Court therefore should not endorse the district court's expansive construction of "doing business" under Section 1391(f)(3).

Instead, the Court should hold that venue was proper under Section 1391(b)(3), which provides that, "if there is no district in which an action may otherwise be brought as provided in this section [section 1391]," venue is proper in any judicial district in which a defendant "is subject to the court's personal jurisdiction with respect to such action." In this action, venue does not lie under Section 1391(f)(1) or (f)(2), because the events giving rise to the claim did not occur in the Southern District of New York, nor is there property there that is the subject of the action. Similarly, venue does not lie under Section 1391(f)(3) because PEP is not licensed to do or doing business in the Southern District of New York. And Section 1391(f)(4) does not apply, because PEP is not a foreign state. Because the district court had personal jurisdiction over PEP, however, venue was proper under Section 1391(b)(3), which functions as a catch-all venue provision for the entire "section."

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[3] Under 28 U.S.C. § 1391(f)(4), a foreign state defendant or its political subdivision can always be subject to venue in the U.S. District Court for the District of Columbia. That provision, however, does not on its face apply to foreign state corporations. *Cf.* 28 U.S.C. § 1603(a) (distinguishing between a "political subdivision" of a foreign state and a state agency or instrumentality).

Because "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other," venue statutes are to be construed to "avoid[] leaving such a gap." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972). There is no indication in the statutory text or legislative history that, in adopting the 1988 amendment adding the arbitration exception to immunity, Congress intended to leave a gap between its grant of subject matter jurisdiction to enforce arbitral awards against foreign state agencies or instrumentalities, and venue over such entities. The construction urged by the United States would, in cases in which none of the venues listed in Section 1391(f) applies, allow for enforcement of arbitral awards against a foreign state corporation in any venue where jurisdiction can be exercised, without the need for an unduly loose standard for "doing business."

POINT III

The District Court Misapplied This Court's Jurisprudence In Declining To Recognize the Mexican Court's Nullification Judgment

The district court recognized and enforced the Mexican arbitral award, notwithstanding that the award has been nullified by a Mexican court. Consistent with the United States' position in pending NAFTA proceedings arising out of the underlying dispute between COMMISA and PEP,[4] the United States does not take a position as to whether the district court properly could conclude on remand that the Mexican nullification decision "violated basic notions of justice." SPA 39. However, the United States addresses several aspects of the district court's

[4] COMMISA's parent company KBR, Inc. commenced an arbitration against the United Mexican States, alleging that, *inter alia*, "Mexican courts violated NAFTA Article 1105, which requires that Mexico and its organs treat investors fairly and equitably." *See* Claimant's Notice of Arbitration at 15–16, *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1 (Aug. 30, 2013), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw3306.pdf. On July 30, 2014, the United States filed a submission in that arbitral proceeding as a "non-disputing" party, declining to "take a position on how [its legal] interpretation applies to the facts of th[e] case." *See* Submission of the United States of America, *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1 (July 30, 2014), *available at* http://www.state.gov/documents/organization/230291.pdf.

reasoning that, in the government's view, diverged from the legal standards that apply to the consideration of a foreign judgment nullifying an arbitral award.

This Court has described the contrasting "regimes for the review of arbitral awards" in "the state in which, or under the law of which, the award was made" and the state "where recognition and enforcement are sought." *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). The first state, *i.e.*, the "rendering state" or primary jurisdiction, may "set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Id.* at 22–23. The second state, *i.e.*, the enforcement state or secondary jurisdiction, "may refuse to enforce the award only on the grounds explicitly set forth in Article V," *id.* at 23, including that the award "has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made." Panama Convention, art. 5(1)(e); *see also* New York Convention, art. V(1)(e). The New York and Panama Conventions do not, however, compel a court to deny recognition and enforcement under Article 5, instead using the permissive term "may." This latitude is consistent with "the strong public policy in favor of international arbitration" recognized by both the New York Convention and U.S. law. *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (recognizing "the emphatic federal policy in favor of arbitral dispute resolution . . . that applies . . . with special force in the field of international commerce").

When a U.S. court is asked to enforce a nullified arbitral award, the court must consider whether to recognize the foreign judgment that has nullified the arbitral award. The appropriate standard for this inquiry is set out in the draft Restatement (Third) of International Commercial Arbitration: "if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances." Restatement (Third) of International Commercial Arbitration § 4-16(b) (Tentative Draft No. 2, Apr. 16, 2012).[5]

[5] Comment d to Section 4-16 gives examples of "extraordinary circumstances" that would justify a refusal to recognize a foreign nullification judgment, including where "the set-aside court knowingly and egregiously departed from the rules governing set-aside in that jurisdiction," and where "other facts give rise to

Linking the issue of whether to enforce a nullified arbitral award to the question of whether to recognize the foreign judgment that nullifies that award is consistent with the New York and Panama Conventions, and gives courts the benefit of guidance from well-developed precedents on the recognition of judgments. "American courts will normally accord considerable deference to foreign adjudications as a matter of comity." *Diorinou v. Mezitis*, 237 F.3d 133, 142 (2d Cir. 2001).[6] Such deference is also consistent with Article 5(1)(e), which, by declining to prescribe standards for nullification in the primary jurisdiction, leaves that issue to the jurisdiction's domestic law. *See* Restatement (Third) of International Commercial Arbitration § 4-16 cmt. a (Tentative Draft No. 2, Apr. 16, 2012) ("The scope and proper exercise of set-aside authority are determined by the arbitration law of the country in which or under the law of which the award was made."). Because courts in the primary jurisdiction apply their domestic law regarding nullification, a refusal to recognize a nullification decision could be perceived as showing a measure of disrespect for that jurisdiction's laws and judicial system. *Cf. Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895).

This standard is also consistent with the prior precedents of this and other Circuits, which have framed the issue of whether to enforce a nullified arbitral

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substantial and justifiable doubts about the integrity or independence of the foreign court with respect to the judgment in question." Restatement (Third) of International Commercial Arbitration § 4-16 cmt. d (Tentative Draft No. 2, Apr. 16, 2012). Reporters' Note d in turn explains that the "additional flexibility" intended by this exception is called for because the standard grounds for non-recognition of a foreign judgment, "[w]hile serviceable and reasonably complete," "may not account for every compelling circumstance"; and that this "residual category" is intended to cover judgments that "should be denied recognition in light of troubling circumstances surrounding the set-aside process," such as when "the judge who set aside the award was compromised by especial pressure not characteristic of the entire system." *Id.* § 4-16 Reporters' note d.

[6] Similar standards have been articulated in two Restatements and the Uniform Foreign Money-Judgments Recognition Act, which more than thirty states, including New York, have adopted. *See* Restatement (Third) of Foreign Relations Law §§ 481–82; Restatement (Second) of Conflict of Laws §§ 98, 104–05; N.Y. C.P.L.R. §§ 5302–04. These standards provide only guidance, however, as federal law governs this case. *Smith/Enron Cogeneration Ltd. P'Ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999).

award in terms of whether to recognize the relevant nullification judgment. This Court considered whether to enforce a nullified arbitral award in *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 196–97 (2d Cir. 1999). There, the parties' contracts provided for arbitration under Nigerian law. *Id.* at 195. Baker Marine obtained two arbitral awards in its favor, but a Nigerian court set aside the awards. *Id.* at 195–96. When Baker Marine nevertheless sought to confirm the arbitral awards in New York, the district court declined to do so, and this Court affirmed. *Id.* at 196–97. The Court held that Baker Marine had "shown no adequate reason for refusing to recognize the judgments of the Nigerian court." *Id.* at 197. The Court further observed that "[r]ecognition of the Nigerian judgment" did not "conflict with United States public policy." *Id.* at 197 n.3.

The D.C. Circuit took a similar approach in *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007), in which TermoRio and Electrificadora del Atlantico, a state-owned public utility, agreed to submit any contractual dispute to arbitration in Colombia. *Id.* at 930–31. A Colombian arbitration panel issued an award in favor of TermoRio, but a Colombian court invalidated the award on the ground that the arbitration clause in the parties' agreement violated Colombian law. *Id.* The D.C. Circuit affirmed the district court's refusal to enforce the invalidated arbitral award, reasoning that there was "nothing in the record here indicating that the proceedings before the [Colombian court] were tainted or that the judgment of that court is other than authentic." *Id.* at 935. The court reasoned that United States courts should not go behind a foreign court's nullification decision absent "extraordinary circumstances." *Id.* at 938. Although the D.C. Circuit acknowledged that Article V(1)(e) of the New York Convention permits enforcement where the foreign nullification judgment violates United States "public policy," it cautioned that courts "must be very careful in weighing notions of 'public policy' in determining whether to credit" a nullification decision. *Id.* As the D.C. Circuit explained, a judgment is "unenforceable as against public policy [only] to the extent that it is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." *Id.* (quoting *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986)).

As set forth above, the Government does not take a position on whether the district court could have demonstrated reasons for refusing to recognize the Mexican court's decision, either on public policy grounds or in light of other extraordinary circumstances. However, the district court did not articulate an adequate basis for doing so. While the district court purported to apply the test set forth in *Baker Marine* and *TermoRio*, its analysis was consistent with neither these

decisions nor § 4-16 of the draft Restatement (Third). The standard for finding that a foreign judgment is "unenforceable as against public policy" is "high, and infrequently met." *Ackermann*, 788 F.2d at 841. The district court concluded that the Mexican court's decision violated basic notions of justice, and thus was unenforceable as against public policy, because it purportedly applied Mexican law retroactively, favored a state enterprise over a private party, and left COMMISA without a remedy in Mexican court. SPA 62–68. As set forth below, these conclusions, at least as articulated by the district court, are not persuasive.

First, the proceedings in the district court focused on whether the Mexican court's decision was correct, not whether it "tend[ed] clearly" to undermine the public interest. Although the district court claimed that it neither decided nor reviewed Mexican law, its reasoning was based on interpretations of both Mexican law and the Mexican court's decision. Before rendering its decision, the district court heard three days of expert testimony on Mexican law—and specifically "the nature of the remedy of administrative rescission and its possible interplay with arbitration." SPA 54–55. These proceedings culminated in findings by the district court that "there was no [Mexican] statute, case law, or any other source of authority that put COMMISA on notice that it had to pursue its claims in court"; that Mexican law did not previously preclude arbitration of decisions to administratively rescind a contract; and that the Mexican court did not apply that amendment only as a "guiding principle," despite its explicit statement to the contrary. SPA 64–68. In making such findings, the district court effectively acted as a Mexican appellate court. Such an extensive inquiry into the soundness of a foreign court's legal reasoning, particularly when that inquiry involves consideration of issues of foreign law that were already considered by the foreign court, is inconsistent with principles of comity and is not an appropriate method of evaluating whether the foreign court's decision "tends clearly" to undermine public confidence in the administration of the law. *Ackermann*, 788 F.2d at 841.[7]

Similarly, in holding that the Mexican nullification judgment violated public policy, the district court stated that the Mexican court had acted "to favor a state

[7] There may, however, be cases in which a foreign court's reasoning is so transparently biased that it justifies a refusal to recognize the court's judgment. For example, if a court, without articulating a reasoned basis, contradicted or failed to follow its prior precedents, its decision might tend clearly to undermine the public confidence in the administration of law. The United States does not intend to suggest that a district court is barred from considering expert testimony or conducting evidentiary hearings in an appropriate case.

enterprise over a private party." SPA 65. The district court did not, however, adequately justify this conclusion or demonstrate that it warrants enforcement of the arbitral award in this case. The district court deemed it "a basic principle of justice" that when a state waives its sovereign immunity and contracts with a private party, "a court hearing a dispute regarding that contract should treat the private party and the sovereign as equals." SPA 65 (citing, *e.g., Winstar*, 518 U.S. at 895). The cases cited by the district court, however, merely discussed principles of U.S. law applicable to U.S. government contracts; they did not purport to articulate overriding principles of fairness that must apply in this setting. While the district court pointed to the Mexican court's invocation of legal principles intended to safeguard public resources, SPA 65, it is not exceptional that a legal system affords protections to sovereigns and their property that it does not extend to private parties. To the extent the district court believed that the Mexican court manipulated the law out of bias in favor of the Mexican government, any such determination would have to be based on "solid proofs (rather than mere speculation) [that] raise substantial and justifiable doubts about the integrity or independence of the rendering court with respect to the judgment in question." *See* Restatement (Third) of International Commercial Arbitration § 4-16, Reporters' note d (Tentative Draft No. 2, Apr. 16, 2012). It is inappropriate to presume that a country's courts will improperly favor its executive branch in litigation involving a government party. We note in this regard that the United States is frequently designated as a seat of arbitration, including in cases involving U.S. government entities. It would be wholly unwarranted for a foreign court to refuse to recognize a U.S. judgment nullifying an award against the U.S. government based on speculation that the U.S. court was motivated by favoritism.

Furthermore, although the district court also placed substantial reliance on its view that COMMISA might lack further recourse, it did not explain why the absence of a remedy in 2011 violated U.S. public policy, or examine whether a judicial remedy in Mexico might have been available at an earlier time. Thus, the district court did not consider whether COMMISA, after failing to prevail in the *amparo* proceeding, could have brought a timely action in Mexican court at that time, SPA 42–43, 45–46, and whether COMMISA, by instead proceeding with arbitration, assumed the risk of a future judicial determination that its dispute was not arbitrable. Many judicial systems, including the United States', presume that courts will decide "disputes about 'arbitrability.'" *BG Grp. v. Republic of Argentina*, 134 S. Ct. 1198, 1206–07 (2014) (collecting cases); *see also* 9 U.S.C. § 10(a)(4) (permitting courts to vacate an arbitral award where "the arbitrators exceeded their powers"); Panama Convention, art. 5(1)(a). Where such disputes

reach courts only after an arbitration has occurred, relevant statutes of limitation may have expired. The district court did not adequately explain why such an expiration, which could also occur in U.S. courts, could by itself render a nullification judgment contrary to public policy.

Because the district court misapplied the law governing the recognition of foreign judgments, the United States recommends that the Court vacate the district court's decision and remand in order to permit the district court to apply the standards outlined above.

POINT IV

The District Court Erred in Augmenting the Final Arbitral Award

Finally, in the view of the United States, the district court erred in augmenting the arbitral award by approximately $106 million so as not to "undermine the award." SPA 83.

As this Court has recognized, "[a]ctions to confirm arbitration awards . . . are straightforward proceedings," *Ottley v. Schwartzberg*, 819 F.2d 373, 377 (2d Cir. 1987), in which "the judgment to be enforced encompasses the terms of the confirmed arbitration awards and may not enlarge upon those terms," *Zeiler*, 500 F.3d at 170. "It is . . . well-settled that the New York Convention does not permit a court in a Contracting State to correct, interpret, or supplement a foreign or nondomestic award." GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3714 (2d ed. 2014). Thus, when a U.S. court is asked to enforce an international arbitral award, it lacks authority to modify that award. *See Gulf Petro Trading Co. Inc. v. Nigerian Nat'l Petroleum Corp.,* 512 F.3d 742, 747 (5th Cir. 2008); *see also Wartsila Finland OY v. Duke Capital LLC*, 518 F.3d 287, 292 (5th Cir. 2008) ("A district court should enforce an arbitration award as written—to do anything more or less would usurp the tribunal's power.").

Here, the district court acknowledged that it was "not confirming the [arbitral tribunal's] preliminary award," SPA 81, which was the only award specifically to address COMMISA's performance bonds, A 143; SPA 81 (noting that "there is nothing in the [final] award itself" that referred to the performance bonds). Nonetheless, the district court appeared to conclude that, because PEP collected on the bonds after the Mexican court had nullified the final arbitral award, its decision not to recognize the Mexican court's judgment also invalidated

that collection. SPA 83. Assuming without deciding that the district court could have enforced injunctive relief in the final award, the final award here contained no such relief, and the district court's approach thus did not enforce the award "as written." *Wartsila*, 518 F.3d at 292. Instead, the district court modified the award to compensate for subsequent events that it regarded as inconsistent with the arbitral panel's intent. Under these circumstances, the district court exceeded its authority by "enlarg[ing]" upon the terms of the final award. *Zeiler*, 500 F.3d at 170.

Conclusion

The Court should vacate the district court's decision and remand for further proceedings consistent with the analysis set forth above.

Dated: February 6, 2015
New York, New York

Respectfully submitted,

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Addendum

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Restatement of the Law Third
The U.S. Law of International Commercial Arbitration

Tentative Draft No. 2

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SUBJECTS COVERED

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§ 4-16. Award Set Aside or Subject to Set-Aside Proceedings

(a) A court may deny confirmation, recognition, or enforcement of a Convention award to the extent that the award has been set aside by a competent authority of the country in which or under the arbitration law of which the award was made.

(b) Even if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances.

(c) If a Convention award is the subject of a set-aside proceeding before a competent authority, a court of the United States may defer the decision whether to grant confirmation, recognition, or enforcement pending the outcome of that proceeding.

(d) For purposes of this Section, a Convention award is deemed made under a particular arbitration law if that law is unambiguously designated by the parties to govern the arbitration.

Comment:

a. Generally. This Section addresses the impact of set-aside proceedings instituted before other courts on an action for post-award relief on a Convention award in a U.S. court. It sets forth principles developed under Articles V(1)(e) and VI of the New York Convention and Articles 5(1)(e) and 6 of the Panama Convention.

Neither Convention precludes a party from seeking, or a competent court from granting, a judgment setting aside an award. However, even during the pendency of such proceedings or following a set-aside judgment, a party may seek confirmation, recognition, or enforcement of a Convention award in a competent court.

The scope and proper exercise of set-aside authority are determined by the arbitration law of the country in which or under the law of which the award was made. In the usual situation, an award is made under the arbitration law of the arbitral situs. However, the parties may select as the law governing the arbitration the law of a jurisdiction other than the situs. To be effective, that selection must be unambiguously made. If the parties make such a selection, the country "in which" an award is made is different from the country "under the law of which" the award is made. Consequently, more than one jurisdiction may exercise set-aside jurisdiction. See Comment *b* of this Section.

b. Competent authority. An authority (typically a court) is "competent" within the meaning of this Section if it is the proper body to set aside the award in question. See § 1-1(f), supra. Under the Conventions, ordinarily only an authority of the seat of arbitration has that competence. However, it is possible for the parties to make an arbitration expressly and unambiguously subject to the arbitration law of a country other than the country where the seat is located. (This is explicitly recognized in Articles V(1)(e) and 5(1)(e) of the New York and Panama Conventions, respectively.) In that event, the award may be set aside by competent authorities at the seat as well as by competent authorities of the country whose arbitration law was designated by the parties.

It follows from the parties' power to designate an arbitration law other than the arbitration law of the situs that a Convention award may concurrently be the subject of set-aside actions in both a foreign and a U.S. court. Two scenarios may be contemplated. First, an arbitration may have its situs in the United States, but be subject to the arbitration law of another country. Second, an arbitration may have its situs in a foreign country, but be subject to U.S. arbitration law. In both situations, a U.S. court would share set-aside authority with a foreign court. If a party seeks confirmation or vacatur of the award in a U.S. court after the award has been confirmed by a competent foreign court, the U.S. court proceeds in accordance with § 4-8, supra; the effects of a foreign judgment vacating an award, by contrast, are governed by this Section.

If a Convention award is made in one foreign country under the arbitration law of another foreign country, the competent courts of both countries have authority to confirm or set aside the award. If the two foreign courts issue inconsistent judgments and the award is later brought to a U.S. court for recognition or enforcement, the U.S. court renders judgment in accordance with its general rules on the recognition or enforcement of inconsistent foreign judgments.

c. Set-aside judgment as basis for refusing post-award relief. Ordinarily, a court will not confirm, recognize, or enforce an award that has been set aside by a competent authority. Awards that have been "suspended" are subject to the same rules as awards that have been set aside. It is for the party opposing confirmation, recognition, or enforcement to demonstrate that the award has been set aside by, or is pending before, a competent authority.

d. Extraordinary confirmation, recognition, and enforcement of set-aside awards. In several narrow situations, a Convention award may be entitled to confirmation, recognition, or enforcement, despite having previously been set aside. First, the authority purporting to set aside an award may not have been competent to do so within the meaning of § 1-1(f), supra.

Second, the judgment setting aside the award may not be entitled to recognition under the rules governing judgment recognition in the court where post-award relief is sought. In most circumstances in which a party seeks confirmation, recognition, or enforcement of a set-aside award, the determination to set aside the award will have been made by a foreign court rather than a U.S. court. The forum where post-award relief is sought will accordingly determine the effect of the foreign set-aside judgment by reference to its own law of foreign judgment recognition. In highly extraordinary circumstances, a U.S. court may also disregard a foreign set-aside judgment, even though, under strict application of the forum's principles of foreign judgment recognition, that judgment would ordinarily be recognized. The court may do so, for example, if the set-aside court knowingly and egregiously departed from the rules governing set-aside in that jurisdiction. It may also do so when other facts give rise to substantial and justifiable doubts about the integrity or independence of the foreign court with respect to the judgment in question. Still another circumstance in which a court may justifiably recognize or enforce an award despite a foreign set-aside judgment is one in which the set aside resulted from the tribunal's having to choose between the parties' designated procedure, on the one hand, and a procedure

mandated by the arbitration law of the seat, on the other, when the two requirements were inconsistent. See § 4-11, Comment *d*, and § 4-15, Comment *c*.

In the unusual scenario in which a U.S. court vacates a foreign Convention award (due to U.S. arbitration law having been selected by the parties), the effect of that judgment in a subsequent action for post-award relief in a U.S. court will be governed by the forum's usual standards for determining the effect of prior domestic judgments, including the constitutional requirements of full faith and credit.

e. Adjournment pending post-award proceedings. Under Article VI of the New York Convention and Article 6 of the Panama Convention, a court asked to grant post-award relief with respect to a Convention award may, in its discretion, adjourn the proceedings pending the outcome of a set-aside action in another jurisdiction. If the court decides to adjourn the action, it may require the posting of appropriate security. The mere fact that a set-aside action could still be brought before a competent authority will not justify a denial or deferral of post-award relief; a set-aside action must be pending. If no such action is pending, post-award relief, if otherwise warranted, must be granted.

f. Waiver and determination sua sponte. A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by § 4-25, infra.

g. Partial grant of post-award relief. In appropriate circumstances, as outlined in § 4-1(d) and (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest.

REPORTERS' NOTES

a. Generally. The Conventions contemplate that competent authorities at the seat of arbitration may set aside an award made there on grounds provided for by the arbitration law of that place. Under the Conventions, an award that has been set aside may be refused recognition and enforcement. The New York Convention, Article V(1)(e), states:

> [R]ecognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked . . . if that party furnishes to the competent authority where recognition and enforcement is sought, proof that: . . . (e) the award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The Panama Convention's counterpart, Article 5(1)(e), is to the same effect.

The Conventions do not preclude a party from seeking confirmation, recognition, or enforcement of an award that has been set aside by a competent authority in the arbitral seat or that is the subject of a pending set-aside action before such an authority. Moreover, the Conventions' permissive language ("may") suggests that a court may grant confirmation, recognition, or enforcement of such an award. The court where such post-award relief is sought may also defer proceedings pending the outcome of a set-aside action. See Comment *e* of this Section. The fact that a court grants an adjournment for this purpose does not prevent the court in its discretion from later confirming, recognizing, or enforcing the award, notwithstanding a set-aside at the place of arbitration. See Comment *d* of this Section. Nevertheless, an award that has been set aside will only in exceptional circumstances be granted confirmation, recognition, or enforcement in a court in the United States. See Comment *d* of this Section.

b. Competent authority. Under both Conventions, it is a basis for refusing confirmation, recognition, and enforcement that an award has been set aside or suspended by "a competent authority." See N.Y. Convention, Article V(1)(e); Panama Convention, Article 5(1)(e). Courts in the United States, with rare exception, have declined to recognize and enforce awards that have been set aside by a court having jurisdiction. See TermoRio S.A., E.S.P v. Electranta S.P, 487 F.3d 928, 936 (D.C. Cir. 2007) (reasoning that "an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made.") (citing with approval Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd., 191 F.3d 194, 197 (2d Cir. 1999)); Spier v. Calzaturificio Tecnica, S.p.A., 71 F. Supp. 2d 279, 279 (S.D.N.Y. 1999) ("Spier II"). But see Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996) (court enforced award set aside by Egyptian courts).

(i). Meaning of "competent." In referring to the adjudicative body purporting to set aside a Convention award, this Section adopts the Conventions' term "authority" instead of "court" to replicate the Convention language and to account for possible differences among legal systems. The Section also uses the Convention term "competent," but gives it a particular meaning. A "competent" authority is one that is entitled under the Convention to perform the functions it ascribes to itself. See § 1-1(f), supra. The qualifier thus distinguishes between courts empowered under a Convention to nullify an award (i.e., those with proper set-aside jurisdiction) and courts whose declarations of set-aside would be exorbitant. See Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech., 763 F. Supp. 2d 12, 24 (D.D.C. 2011) (French courts, not Qatari courts, had authority to set aside Convention award); The New York Convention identifies as competent the authorities "of the country in which, or under the law of which, [the] award is made." N.Y. Convention, art. V(1)(e) (1958).

The Conventions do not preclude a court asked to confirm, recognize, or enforce a Convention award from examining the competence, in the Restatement sense, of the authority claiming to have invalidated the award, and courts in the United States have done so. See *Int'l Trading & Indus.*, 763 F. Supp. 2d at 24 (Qatari court's set-aside judgment not entitled to comity; arbitral seat was France); *TermoRio S.A. E.S.P.*, 487 F.3d at 941 (annulling court was one properly claiming set-aside jurisdiction); Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 267 F. Supp. 2d 1335, 1345-1347 (S.D. Fla. 2003) (Florida federal court, not Venezuelan courts, had proper jurisdiction). A court's principal concern is to ensure that the body that asserted set-aside jurisdiction belongs to the country in which or under whose law the award was made. Additionally, a court

may properly consider the plausibility of that body's authority within the relevant foreign legal system. Ordinarily, that secondary inquiry requires a court only to confirm the absence of obvious over-reaching by the foreign authority, and does not extend to an examination of the foreign jurisdiction's venue rules or similar technicalities, an inquiry that would be both onerous and inappropriate.

(ii). Awards "made under the law of." Ordinarily only an authority of the seat of arbitration has competence to set aside an award rendered there. Nevertheless, Articles V(1)(e) and 5(1)(e) of the New York and Panama Conventions, respectively, support the notion that, under some circumstances, a court of a country other than the place of arbitration may be authorized to exercise set-aside authority. The relevant language of the Conventions is cryptic. New York Convention Article V(1)(e) refers, without elaboration elsewhere in the treaty, to the possibility of set-aside by a court of the country "in which or under the law of which" the award is made. The Panama Convention's counterpart language is quite similar. This formulation has given rise to difficult questions of interpretation.

A first question concerns the meaning of the treaty language "under the law of" a particular country. The Restatement adopts as the most plausible interpretation of the term "law" in that context the law governing the arbitral proceedings, as distinct from the law governing the parties' contract or their arbitration agreement. See Belize Social Dev. Ltd. v. Belize, 2012 WL 104462 *4 (D.C. Cir. 2012); *Int'l Trading & Indus.*, 763 F. Supp. 2d at 21 n.5 (D.D.C. 2011); Karaha Bodas v. Perusahaan Pertambangan Minyak, 364 F.3d 274, 289 (5th Cir. 2004); Alghanim & Sons, 126 F.3d at 21 & n.3; M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 847-848 (6th Cir. 1996); Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, 745 F. Supp. 172 (S.D.N.Y. 1990). Use of the disjunctive "or" suggests that the Conventions contemplate a situation in which the law governing the arbitration is the arbitration law of a jurisdiction other than the seat.

A second question to be addressed is whether in any given circumstance an award is made under an arbitration law other than that of the seat. A variety of fact-based and intention-based tests could be devised; however the Restatement, in paragraph (d) of this Section, posits that the parties' joint intentions should control the question and that those intentions need to be expressed unambiguously. Such a requirement promotes legal certainty, while acknowledging that it is uncommon for parties to make such an election. Parties intending to designate an arbitration law other than that of the seat will ordinarily do so in the arbitration clause itself; they may, but need not, confirm their expectations by adding language to the effect that the designation of an arbitration law other than that of the seat is intended to acknowledge set-aside powers in the courts of the jurisdiction whose arbitration law was designated.

The Convention language suggests that the jurisdiction "under the law of which" an award is made enjoys authority to set aside the award, and presumably also to confirm it. That, however, raises a third and quite difficult question, namely the effect that the parties' designation of an arbitration law other than that of the seat has on the set-aside authority of the otherwise competent authorities at the seat. One view is that the authority granted by the parties to the courts of the place whose arbitration law they chose confers exclusive set-aside jurisdiction, thus supplanting the set-aside authority of the courts of the seat. This solution has the advantage of ensuring that one and only one jurisdiction enjoys set-aside authority over any given award. The Restatement does not adopt that position, however, largely because set-aside authority is properly viewed as an inherent power of the arbitral seat. Depriving courts of that authority merely because the parties selected another country's law of arbitration would prevent courts of the arbitral seat from correcting even the most fundamental defects in the arbitral proceeding or the award. The jurisdiction whose arbitration law was chosen may not be disposed or equipped to address such concerns. Preserving a U.S. court's right to consider the full panoply of grounds for challenging an award made in the U.S. is also most consistent with § 4-24(a), infra, which denies effect to agreements to reduce or eliminate grounds for post-award relief. In particular, it preserves for courts of the seat the opportunity to police the arbitrability of the dispute and the conformity of the award with public policy. These are grounds to which the set-aside court applies its own law and which that court may raise sua sponte.

The Restatement position that the parties do not by choosing a foreign arbitration law deprive the seat's courts of set-aside power is consistent with the Conventions' language. It will presumably also comport well with the parties' expectations. The courts have not yet specifically decided whether two different jurisdictions can have authority to set aside an award, but one opinion in dictum arguably rejects it. See

Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas, 364 F.3d 274, 287 (5th Cir. 2004) (suggesting that only one system has set-aside powers).

(iii). Variants on concurrent set-aside jurisdiction. Concurrent set-aside jurisdiction can exist in various configurations. Two such configurations implicate the set-aside authority of a U.S. court. In one scenario, the parties to an international arbitration seated in the United States have designated a non-U.S. arbitration law to govern the proceedings. Conversely, the parties to an international arbitration seated in a foreign country have designated U.S. law as the applicable law of arbitration. In that event, the U.S. court and the foreign court have concurrent authority to confirm or set aside the award.

If the award is initially brought to a U.S. court for confirmation or vacatur, the court will treat the request as it would any other request for confirmation or vacatur of a local award. It may happen, however, that the award is brought first to the foreign court for confirmation or vacatur. If, after that court renders judgment, confirmation or vacatur is sought in a U.S. court, the latter must determine the effect of the foreign adjudication. If the foreign judgment confirmed the award, the U.S. court proceeds in accordance with § 4-8, supra; the effects of a foreign judgment vacating an award, by contrast, are governed by this Section. The two Sections will lead to substantially similar analyses; this Section, however, allows a court to consider whether extraordinary circumstances require that it not recognize the foreign vacatur (set aside) judgment in question. A U.S. court may also face problems of concurrent set-aside authority if it is asked to recognize or enforce an award made in one foreign country under the arbitration law of another foreign country. In this scenario, two foreign jurisdictions enjoy concurrent set-aside authority. If the two foreign courts have by then reached inconsistent results, the U.S. court will presumably be guided by its usual judgment recognition rules applicable to inconsistent foreign judgments.

In still a further scenario, two U.S. states will have concurrent set-aside authority over a single U.S. Convention award, because the award was made in one U.S. state expressly under the arbitration law of another U.S. state. In keeping with the Restatement position, a vacatur action may be brought in either state. If such an action is brought in both jurisdictions, the second court will give the judgment of the other court, if one has already been rendered, the effect prescribed by its own principles of issue or claim preclusion. If the two competent courts render inconsistent judgments, and recognition or enforcement of the award is later sought in a third state (or if one of the judgments is brought to the third state for recognition or enforcement), a court of the third state will presumably be guided by its general rules applicable to inconsistent sister-state judgments, as well as principles of full faith and credit.

In every concurrent jurisdiction scenario mentioned, the court in which post-award relief is sought has the option of deferring its proceedings to await the outcome of a set-aside action pending before a competent court.

c. Set-aside as basis for refusing post-award relief. Though courts in the United States ordinarily decline to recognize and enforce awards that have been set aside by a court having proper jurisdiction, the Restatement acknowledges that under the Conventions a court may in certain exceptional situations confirm, recognize, or enforce an award that has been set aside. This view is consistent with the permissive language—recognition and enforcement "may [not "must"] be refused"—found in the English version of the Conventions. However, the Restatement rule states clearly that it is only in rare circumstances that annulled awards will be given effect.

d. Extraordinary confirmation and enforcement of set-aside awards. The circumstances, other than lack of proper jurisdiction, that might justify confirmation or recognition and enforcement of an award that has been set aside have not been comprehensively canvassed by the courts. In distinguishing the cases before them, some courts have made passing reference to set-aside proceedings that were "fatally flawed" or that produced annulments that were "other than authentic," see *TermoRio*, 487 F.3d at 941, or that involved local courts acting contrary to their own law, see *Baker Marine*, 191 F.3d at 197. Commentators on Article V(1)(e) have been more systematic than courts, and have produced a diverse body of scholarship on the matter. See William W. Park, Duty and Discretion in International Arbitration, 93 Am. J. Int'l L. 805 (1999); Jan Paulsson, Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment (LSA), 9(1) ICC Int'l Ct. Arb. Bull. 14 (1998); Richard W. Hulbert, Further Observations on Chromalloy: A Contract Misconstrued, A Law

Misapplied, and an Opportunity Foregone, 13 ICSID Rev.-Foreign Inv. L.J. 124 (1998); William W. Park, Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators, 8 Am. Rev. Int'l Arb. 133 (1997).

Though other approaches have been suggested, the Restatement takes as its point of departure the law of judgments of the court where recognition or enforcement is sought, inasmuch as a judgment of set-aside is, after all, a judgment. That jurisprudence alone will address many troubling fact patterns. The Uniform Foreign Money-Judgments Recognition Act (1962) (UFMJRA), enacted in over 30 states, excuses nonrecognition, and in some cases precludes recognition, when the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law, or when the court did not have subject matter or personal jurisdiction. Additionally, nonrecognition is permitted but not required when the defendant in the proceeding did not receive notice of the proceeding in sufficient time to enable it to defend, when the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case, or when the cause of action (sometimes expressed as "claim for relief") on which the judgment was based was repugnant to the public policy of the enacting state or of the United States. See UFMJRA § 4(b) (1962).

While serviceable and reasonably complete, the standard grounds for nonrecognition of judgments may not account for every compelling circumstance, thus calling for the additional flexibility intended by the Restatement language "or in other extraordinary circumstances." The residual category envisioned by this phrase is intended primarily to cover judgments of set-aside that might qualify for recognition under the standard grounds, but that nevertheless should be denied recognition in light of troubling circumstances surrounding the set-aside process. For instance, none of the original 1962 UFMJRA grounds neatly fits the situation in which the judge who set aside the award was compromised by especial pressure not characteristic of the entire system. See UFMJRA § 4 (1962).

The ALI Proposed Federal Statute, by contrast, contains an additional ground designed to catch judgments produced amidst disturbing circumstances connected only to the particular proceeding. See ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, § 5(a)(ii) (2006) ("circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to *the judgment in question*") (emphasis added). An equivalent formulation is found in the UFMJRA, as revised in 2005 to become the Uniform Foreign-Country Money Judgment Recognition Act (UFCMJRA). See UFCMJRA § 4(c)(7) (2005). Circumstances of this kind may be deemed to exist when solid proofs (rather than mere speculation) raise substantial and justifiable doubts about the integrity or independence of the rendering court with respect to the judgment in question. The focus is on the specific proceedings that led to the set-aside, and more particularly on whether the set-aside court knowingly and egregiously departed from the rules ordinarily applied to such actions in the jurisdiction.

"Extraordinary circumstances" may also exist if the court setting aside the award did so because of the procedure chosen by the tribunal when confronted with a conflict between the mandatory law of the seat and the parties' agreed-upon procedure. See § 4-15, Comment *c*. Thus, if a tribunal has complied with the requirements of the arbitration agreement, but in doing so violated the seat's mandatory law, in turn leading to set aside, a court may decide to grant confirmation, recognition, or enforcement, if the conditions for such relief are otherwise met. Conversely, a competent authority at the seat might set aside an award because the tribunal departed from the parties' agreement, even though the tribunal did so in an effort to comply with rules of the situs that it deemed mandatory. Though ordinarily a material violation of the parties' agreement on procedure would also be a ground for refusal of recognition and enforcement of the award (See § 4-15), a court would be entitled to consider the dilemma that faced the tribunal, and recognize and enforce the award despite its having contravened the parties' agreement and despite its having been set aside, provided no other ground for denying recognition or enforcement is present.

New York Convention Article VII(1) is sometimes raised in connection with awards that have been set aside. It provides in pertinent part:

> The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon.

Article VII is sometimes called the "right to avail clause" or "most favorable provision clause." See, e.g., U.N. Comm. on Int'l Trade Law, 41st sess., June 16–July 3, 2008, U.N. Doc. A/CN.9/661/Add.1 (2008) (May 8, 2008, comments of Spain). The excerpted portion of the Article anticipates at least two circumstances. First, by virtue of a treaty other than the New York Convention, an award recipient may be entitled to recognition or enforcement with fewer obstacles than can arise under the New York Convention, such as, for example, if a Friendship, Commerce, and Navigation Treaty were to supply an alternative, more efficient, mechanism for enforcing awards also covered by the New York Convention.

The second circumstance is contemplated by Article VII(1)'s preservation of an interested party's right to avail itself of an award "in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon." The Restatement rejects the view that this clause might require or even justify giving effect to an award that has been set aside at the seat of arbitration. Regardless of what the Convention's drafters might have meant by use of the imperative language "shall not . . . deprive" in Article VII, that provision does not apply if there exists within the jurisdiction no alternative regime applicable to the Convention award in question. For Convention awards, Chapter One of the FAA does not constitute such an alternative regime. See § 4-1, supra.

The Restatement accordingly does not adopt the reasoning of Chromalloy Aeroservices, Corp. v. Arab Republic of Egypt, 939 F. Supp. 907, 912-913 (D.D.C. 1996), to the extent that it relied on Article VII's "right-to-avail" clause to justify enforcing an award that had been set aside by Egyptian courts at the seat of arbitration. Subsequent courts have distinguished *Chromalloy*, or have rejected it explicitly. See TermoRio S.A., E.S.P v. Electranta S.P, 487 F.3d 928, 937 (D.C. Cir. 2007); Spier II, 71 F. Supp. 2d 279, 287-288 (S.D.N.Y. 1999) (unnecessary to decide *Chromalloy*'s correctness).

e. Adjournment pending post-award proceedings. Under New York Convention practice, recognition, or enforcement of an award is often sought while courts at the arbitral seat remain seized of a set-aside or analogous action directed against the award. See Spier v. Calzaturificio Tecnica S.p.A., 663 F. Supp. 871, 874-875 (S.D.N.Y. 1987) ("Spier I"); Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 961-963 (S.D. Ohio 1981). If a set-aside action before a competent authority operated automatically to defer enforcement, the Conventions' aims could be easily subverted. Nevertheless, to confirm or enforce an award that is later set aside by a competent court potentially burdens the interstate system with inconsistent dispositions of the same dispute.

New York Convention Article VI and its Panama Convention counterpart introduce flexibility into a court's treatment of awards that are the subject of foreign set-aside proceedings. Article VI of the New York Convention states in relevant part:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

In keeping with the plain meaning of the Convention language, U.S. courts consider adjournment under Article VI to be wholly discretionary. See *Spier I*, 663 F. Supp. at 875; *Fertilizer Corp.*, 517 F. Supp. at 961-963. As suggested in Article VI, adjourning courts may require the party seeking adjournment to post security. See Caribbean Trading & Fid. Corp. v. Nigerian Nat'l Petrol. Corp., 948 F.2d 111 (2d Cir. 1991). See also Alto Mar Girrossol v. Lumbermens Mut. Cas. Co., 2005 WL 947126 (N.D.Ill.) (proceedings stayed; party requesting stay to provide suitable security as a condition of the stay). To justify adjournment, however, the set-aside proceeding must be underway; it is not sufficient that a set-aside proceeding may possibly still be brought by virtue of not yet being time-barred.

The operation of Article VI in U.S. courts is illustrated by *Spier I* and *Spier II*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999). In *Spier I*, an Italian award was presented for enforcement, though set-aside of the award was being sought in the Italian courts. The federal district court, per Judge Haight, after considering the interrelationship of Articles V(1)(e) and VI, and the importance under the Convention of the courts at the arbitral seat, reasoned that adjournment should only be denied if the attack on the award in those courts was

"transparently frivolous." Spier I, 663 F. Supp. at 875. Over a decade later, the original award recipient returned to Judge Haight's court seeking enforcement of the award, again under the Convention. By that juncture, the Italian courts had nullified the award. The district court declined to enforce it. See Spier II, 71 F. Supp. 2d at 288-289. Courts, however, have not invariably postponed enforcement when alerted to foreign set-aside proceedings brought against the award in question. See G.E. Transp. S.P.A. v. Republic of Alb., 693 F. Supp. 2d 132, 138 (D.D.C. 2010) (enforcing an award subject to foreign proceedings after balancing "the Convention's policy favoring confirmation of arbitral awards against the principle of international comity embraced by the Convention.") (citation omitted).

f. Waiver and determination sua sponte. A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by § 4-25, infra.

g. Partial grant of post-award relief. In appropriate circumstances, as outlined in § 4-1(d) and (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest.